LIBRARY
SUPREME COURT, U. S.

No. 74-1322

FILED
APR 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

STEPHEN A. BODZIN and TANYA K. BODZIN, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN J. YUSOW
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
Federal Bar Building
1815 H Street, N.W.
Washington, D.C. 20006
Counsel for Petitioners

[illegible] Press, Inc., Washington, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	10
Appendix A: Opinion in this Case of the United States Tax Court	1a
Appendix B: Opinion in this Case of the United States Court of Appeals of the Fourth Circuit	14a
Appendix C: Internal Revenue Code of 1954 (26 U.S.C.) Sec. 162, Sec. 262; Treasury Regulations on Income Tax (1954 Code) 26 C.F.R., § 1.162-1, § 1.262-1	19a

CITATIONS

Cases:

Stanley E. Bailey, T. C. Memo. 1971-107, 30 T.C.M. 460	7
Herman Bischoff, T. C. Memo. 1966-102, 25 T.C.M. 538	7
Commissioner v. *Tellier*, 383 U.S. 687 (1966)	6
James L. Denison, T. C. Memo. 1971-249, 30 T.C.M. 1074	7-8
Dietrich v. *Commissioner*, 503 F.2d 1379 (1974), affirming *per curiam Marvin L. Dietrich*, T. C. Memo. 1971-159, 30 T.C.M. 685	5, 6, 8
LeRoy W. Gillis, T. C. Memo. 1973-96, 32 T.C.M. 429	8
Thomas J. Green, Jr., 59 T.C. 456 (1972)	9
Richard Keith Johnson, T. C. Memo. 1972-192, 31 T.C.M. 941	8

Page

Newi v. *Commissioner,* 432 F.2d 998 (1970), affirming T. C. Memo. 1969-131, 28 T.C.M. 686 .....5, 6, 8

Christopher A. Rafferty, T. C. Memo. 1971-203, 30 T.C.M. 848 7

Welch v. *Helvering,* 290 U.S. 111 (1933) 6

STATUTES:

28 U.S.C. § 1254(1) 2

Internal Revenue Code of 1954 (26 U.S.C.):
Sec. 162 .....5, 6, 8
Sec. 162(a) 2
Sec. 262 .....2, 5, 8

Rev. Rul. 62-180, 1962-2 Cum. Bull. 52 .....8, 9

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):
§ 1.162-1 ..... 19a
§ 1.262-1 ..... 19a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

STEPHEN A. BODZIN and TANYA K. BODZIN, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Stephen A. Bodzin and Tanya K. Bodzin, husband and wife, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Appendix A, *infra,* pp. 1a-13a) are reported at 60 T.C. 820. The opinion of the Court of Appeals (Appendix B, *infra,* pp. 14a-18a) is reported at 509 F.2d 679 (1975).

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1975 (Appendix B, *infra,* p. 14a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the expenses of maintaining an office in petitioners' home in which petitioner Stephen A. Bodzin performed part of his duties as an employee constitute ordinary and necessary business expenses deductible under Section 162(a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 [Sections 162(a) and 262] and the Treasury Regulations on Income Tax pertaining to these provisions are set forth in Appendix C, *infra*, p. 19a.

STATEMENT OF THE CASE

The facts are undisputed, and are presented here substantially as found by the Tax Court below (Appendix A).

Throughout 1967, petitioner[1] was employed as an attorney-adviser in the Interpretative Division, Office of the Chief Counsel, Internal Revenue Service. The primary function of the Interpretative Division is to provide legal advice to the Commissioner of Internal Revenue.

Petitioner worked primarily on proposed ruling letters and published rulings, requests from the Assistant Commissioner (Technical) for technical advice, and requests from other divisions within the Office of Chief

[1] Mrs. Bodzin is a party to this action only because joint returns were filed; Stephen A. Bodzin will hereinafter be referred to as "petitioner."

Counsel for opinions with regard to particular tax law problems. In general, his work involved review, analysis, research and opinion writing. Petitioner generally worked independently, without day-to-day supervision, receiving guidance only when requested or when guidance was deemed necessary.

It was not the policy of the Interpretative Division to request its attorneys to work overtime. Accordingly, petitioner was not required, requested, expected, or encouraged to work after normal working hours (9 a.m. to 5:30 p.m.), nor was he given additional compensation for doing so. He was, however, expected to complete his work with reasonable promptness.

Nevertheless, petitioner's duties and responsibilities were of such a nature that he frequently deemed it desirable to work overtime in order to meet deadlines, self-imposed or otherwise, and to insure that work was performed to the best of his abilities. In addition, he used evenings and weekends to read widely about current developments in the tax law.

Petitioner was provided an office in the Internal Revenue Building in downtown Washington, D.C. That office was open, and heated or air-conditioned in the evenings and over the weekends and on holidays.

During 1967 the petitioner, his wife and one child lived in an apartment in Alexandria, Virginia, approximately 10 miles from the Internal Revenue Building. The apartment contained six rooms, including a separate study or den. The study, which was approximately 8 feet by 12 feet, was furnished with office furniture, book cases, cabinets and lamps. The room was not used when entertaining visitors and was generally not used by anyone except the petitioner. Petitioner used the

study as his home office and for occasional non-business purposes, such as stamp collecting activities, reconciliation of monthly bank statements and payment of bills.

Petitioner usually worked in his home office two or three evenings during the week and for 3 to 5 hours on weekends. He worked on cases and other matters assigned to him and read about recent developments. With respect to his cases, he sometimes relied on reference materials of his own stored in the study and sometimes on materials that he had photocopied and brought home. He frequently worked on first drafts of memoranda in his home office. He also used the office to prepare for conferences.

Petitioner worked after regular working hours in his home office rather than returning to his office in the Internal Revenue Building because it was more convenient to do so and because he thought it was more efficient. Also, working in the home office in the evening enabled petitioner to make better use of his car pool and to spend more time with his family.

Petitioners paid a total of $2,100 in rent for their apartment in 1967. Petitioner determined that $100 of this amount was allocable to the use of the study as a home office; accordingly, petitioners deducted $100 as "business expenses deductible under sec. 162,"[2] an itemized miscellaneous deduction on their 1967 return. The Commissioner of Internal Revenue disallowed the claimed deduction.

In a reviewed opinion, the Tax Court determined that petitioner's use of his home office was appropriate

[2] All statutory references are to the Internal Revenue Code of 1954.

and helpful to the performance of his duties as an attorney for the Internal Revenue Service, and held (with four dissents) that the expenses of maintaining the home office fall within Section 162 and outside Section 262.

The Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court, concluding that the expense in question was a personal expense within the meaning of Section 262 and not a business expense. The Court of Appeals expressly determined that it was unnecessary to decide whether the expense of maintaining the home office was appropriate and helpful in carrying on the petitioner's business.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the earlier decisions of the Court of Appeals for the Second Circuit in *Newi* v. *Commissioner,* 432 F.2d 998 (1970) and the Court of Appeals for the Eighth Circuit in *Dietrich* v. *Commissioner,* 503 F.2d 1379 (1974), as well as numerous decisions of the Tax Court, and only this Court can resolve the conflict.

The taxpayer in the *Newi* case was employed as a salesman of television time for the American Broadcasting Company ("ABC") television network. Newi maintained a study-office in his apartment in Manhattan, cross town from his regular office. The Tax Court [3] found that Newi regularly worked in his study-office "reviewing his notes on the day's selling activities, studying various research materials and ratings, making his plans for the next day's work, and viewing the television advertisements of ABC and its competitor

[3] *George H. Newi,* T. C. Memo. 1969-131, 28 T.C.M. 686.

networks." The Tax Court further found that the "study was not used by [taxpayer] or his wife for personal entertaining or personal television viewing."

The Tax Court in *Newi* determined that the proper standard to be applied in determining whether the expenses of maintaining the study were "ordinary and necessary" within the meaning of Section 162 was that laid down by this Court in *Welch* v. *Helvering,* 290 U.S. 111, 113 and *Commissioner* v. *Tellier,* 383 U.S. 687, 689 (1966), *i.e.,* whether the contested expenditure was "appropriate and helpful" to the conduct of the taxpayer's business. Applying that standard, the Tax Court held the expenses relating to Newi's study were deductible as ordinary and necessary business expenses.

In affirming the decision of the Tax Court in *Newi,* the United States Court of Appeals for the Second Circuit focused upon the fact that it would have been highly inconvenient for the taxpayer to return to his office after dinner and upon the further fact that his study-office constituted an ideal place for the type of work that he performed there. It made no difference to the Court of Appeals for the Second Circuit that the ABC Building was open in the evening with office space and television equipment available for Newi's use.

It is respectfully submitted that *Newi* cannot be distinguished from this case in any meaningful way. Except for the fact that Newi was employed by ABC as a television advertising salesman while petitioner was employed by the Internal Revenue Service as an attorney, the facts in the two cases are practically identical.

In *Dietrich* v. *Commissioner, supra,* the taxpayers were a husband and wife, both of whom were employed

during the year in issue; the husband as a resident physician and the wife as a registered nurse and instructor. They had an office in the basement of their home which was used by Dr. Dietrich in preparing and grading lessons in connection with his teaching duties, to keep up with his medical reading, and to treat an occasional patient. Mrs. Dietrich used the office for professional reading and for grading papers. The office was also used occasionally for nonbusiness purposes, such as paying personal bills. The Dietrich's were not required by their respective employers to have an office at home, but, as the Tax Court [4] stated, "they found the office to be the most convenient place for efficiently accomplishing some of their work." Dr. Dietrich had no office nor any period of uninterrupted time for accomplishing the work he did at home at the various hospitals at which he was employed.

The Tax Court found that the Dietrich's home office was "appropriate and helpful" in performing their respective duties, and held that they were entitled to deduct the expenses relating thereto. The Court of Appeals for the Eighth Circuit affirmed in a *per curiam* decision.

In numerous other cases, both prior and subsequent to the decision of the Second Circuit in *Newi*, the Tax Court has held the expenses of maintaining a home office to be "appropriate and helpful" to the conduct of a taxpayer's business as an employee, and therefore deductible business expenses. *Herman Bischoff*, T. C. Memo. 1966-102, 25 T.C.M. 538; *Stanley E. Bailey*, T. C. Memo. 1971-107, 30 T.C.M. 460; *Christopher A. Rafferty*, T. C. Memo. 1971-203, 30 T.C.M. 848; *James L.*

[4] *Marvin L. Dietrich*, T. C. Memo. 1971-159, 30 T.C.M. 685.

Denison, T. C. Memo. 1971-249, 30 T.C.M. 1074; *Richard Keith Johnson,* T. C. Memo. 1972-192, 31 T.C.M. 941; and *LeRoy W. Gillis,* T. C. Memo. 1973-96, 32 T.C.M. 429.

In this case, the Court of Appeals for the Fourth Circuit concluded that the expense of renting petitioners' apartment was a personal expense within the meaning of Section 262 and that "[I]t is, therefore, unnecessary to decide whether it was appropriate and helpful in carrying on his business." The Fourth Circuit's rejection of the "appropriate and helpful" standard for determining whether the portion of the petitioners' rental attributable to the home-office was a business expense within the meaning of Section 162 places it in conflict with the decision of the Second Circuit in *Newi* and the Eighth Circuit in *Dietrich.* The writ should be granted because only this Court can resolve that conflict.

2. The question presented in this case is of general importance in the administration of the Federal income tax laws. That question is being widely litigated, and will continue to be so litigated until it is authoritatively settled by this Court. The issue involved is of importance to many taxpayers who are employees and independently do employment-related work in an office they maintain at home.

The Commissioner of Internal Revenue has recognized that certain taxpayers who are employees and maintain an office in their home are entitled to deduct the costs of maintaining that office as ordinary and necessary business expenses. This was done in Rev. Rul. 62-180, 1962-2 Cum. Bull. 52, which holds that "An employee who, as a condition of his employment, is required to provide his own space and facilities for

performance of his duties and regularly uses a portion of his personal residence for that purpose may deduct a pro rata portion of the expenses of maintenance and depreciation on his residence." The Tax Court and two Courts of Appeals have rejected the standard for deductibility of home office expenses set forth in Rev. Rul. 62-180. Moreover, both administratively and in litigation, the Internal Revenue Service has deviated from Rev. Rul. 62-180 and has conceded the deductibility of home office expenses in situations clearly falling outside the rule of the Revenue Ruling. *Thomas J. Green, Jr.*, 59 T.C. 456 (1972).

Presently, there is uneven administrative treatment throughout the United States. In general, the amounts of deductions are not large; and in those situations where deductions are being denied most taxpayers cannot afford the cost to pursue the administrative and judicial remedies available to them. The conflict among the circuits on this issue can only stimulate additional disputes, and in all likelihood, most taxpayers will not find it worth their while to pursue their legal remedies. In this connection, the conflicts could well extend to other types of employee expenses (*e.g.*, special clothing, educational expenses, business meals) unless the conflict as to the applicable standard for distinguishing business from personal expenses is resolved. This Court should therefore resolve the clear conflict among the circuits and put the issue to rest.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. YUROW
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
Federal Bar Building
1815 H. Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners